

MAR 6 2003

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CATHY A. CATTERSON
U.S. COURT OF APPEALS

NATHANIEL TURNER, JR.,

Plaintiff - Appellant,

v.

D.Z. TERRY, CO. III, sued in individual &
official capacity, et al.,

Defendants - Appellees.

No. 01-17289

D.C. No. CV-00-00018-SMM

MEMORANDUM*

Appeal from the United States District Court
for the District of Arizona
Stephen M. McNamee, District Judge, Presiding

Submitted February 12, 2003**
San Francisco, California

Before: BEEZER, THOMAS, and CLIFTON, Circuit Judges.

In this prisoner suit brought under 42 U.S.C. § 1983, Nathaniel Turner
alleges (1) that Masterson and Terry retaliated against him concerning the loss of

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by the courts of this circuit except as provided by Ninth Circuit Rule 36-3.

** This panel unanimously finds this case suitable for decision without oral
argument. See Fed. R. App. P. 34(a)(2).

his stereo, (2) that Masterson violated due process in seizing his stereo, and (3) that Kirkham cruelly and unusually punished him by applying handcuffs that were too small. The district court dismissed all claims against Masterson and Terry and granted summary judgment for Kirkham. We affirm the district court's dismissal of the claims against Masterson and Terry. We reverse the district court's grant of summary judgment for Kirkham.

As the parties are familiar with the facts, we recite them only as necessary. We review *de novo* the district court's dismissal under 28 U.S.C. § 1915A of the claims against Masterson and Terry. See Resnick v. Hayes, 213 F.3d 443, 447 (9th Cir. 2000). The retaliation claims properly were dismissed because Terry failed to allege that the retaliatory actions advanced no legitimate penological goal. See Barnett v. Centoni, 31 F.3d 813, 815-16 (9th Cir. 1994). The due process claims were properly dismissed because Terry has an adequate post-deprivation remedy under Arizona law. See id. at 816; Howland v. State, 818 P.2d 1169, 1172-73 (Ariz. Ct. App. 1991).

We review the grant of summary judgment *de novo*. Barnett, 31 F.3d at 815. In his First Amended Complaint, Turner checked the box for "Excessive force by an officer" in describing count II. This sufficed to plead an excessive force claim under the liberal construction we afford *pro se* complaints. See

Eldridge v. Block, 832 F.2d 1132, 1137 (9th Cir. 1987). Because Turner pled a claim for excessive force, the district court erred by declining to consider that claim. Summary judgment was inappropriate. We remand to the district court for further proceedings on that claim. Each party shall bear their own costs.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.